

Letter of Findings: 04-20120294
Gross Retail Tax
For the Years 2006 through 2010

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ISSUE

I. Lump Sum Contract – Gross Retail Tax.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); [45 IAC 2.2-1-1\(a\)](#); [45 IAC 2.2-3-9](#); Sales Tax Information Bulletin 60 (April 2011).

Taxpayer claims that it is not required to collect or pay sales/use tax on the price it charged for what it purports to be a lump sum contract.

STATEMENT OF FACTS

Taxpayer is an out-of-state pump repair service which conducts business both within and outside Indiana. The Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer explained the basis for the protest. This Letter of Findings results.

I. Lump Sum Contract – Gross Retail Tax.

DISCUSSION

Taxpayer repaired a pump for an Indiana customer. Taxpayer charged the customer \$1,960 but did not charge or collect sales tax. The audit concluded that the Taxpayer should have collected the tax and assessed use tax on the \$1,960 transaction. Taxpayer disagrees stating that the \$1,960 included the price of both labor (\$1,850) and materials (\$110) and that Taxpayer self-assessed sales tax on the value of the materials used in fulfilling the contract.

At the outset, it should be noted that it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions generally involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

Specifically, IC § 6-2.5-2-1 provides as follows:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

IC § 6-2.5-3-2(a) provides for the complementary use tax:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Taxpayer claims that the pump repair was billed pursuant to a "lump sum contract." A "lump sum contract" is defined as "a contract in which all of the charges are quoted as a single price." Sales Tax Information Bulletin 60 (April 2011), 20110427 Ind. Reg. 045110247NRA.

The responsibility for paying sales tax on materials used in construction projects utilized to improve real property is addressed at [45 IAC 2.2-3-9](#) which provides:

- (a) A contractor may purchase construction material exempt from the state gross retail tax only if he issues either an exemption certificate or a direct pay certificate to the seller at the time of purchase.
- (b) A contractor who purchases construction material exempt from the state gross retail tax or otherwise acquires construction material "tax-free", is accountable to the Department of Revenue for the state gross retail tax when he disposes of such property.
- (c) A contractor has the burden of proof to establish exempt sale or use when construction material, which was acquired tax free, is not subject to either the state gross retail or use tax upon disposition.
- (d) Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to

collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

- (1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor and other charges (only the gross proceeds from the sale of the construction materials are subject to tax), or
- (2) Construction material sold over-the-counter. Over the counter sales of construction materials will be treated as exempt from the state gross retail tax only if the contractor receives a valid exemption certificate issued by the person for whom the construction is being performed or by the customer who purchases over-the-counter, or a direct pay permit issued by the customer who purchases over-the-counter.
- (e) Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:
 - (1) He converts the construction material into realty on land he owns and then sells the improved real estate;
 - (2) He utilizes the construction material for his own benefit; or
 - (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.
- (f) A disposition under C. [subsection (e)(3) of this section] will be exempt from the use tax only if the contractor received a valid exemption certificate, not a direct pay permit, from the ultimate purchaser or recipient of the construction material (as converted), provided such person could have initially purchased such property exempt from the state gross retail tax. (Emphasis added).

As explained in the Department's relevant Information Bulletin, under a "lump sum contract" for an improvement to real property, the contractor/vendor is responsible for paying use tax on the price paid for the materials incorporated into the customer's realty.

If a construction contractor purchases construction materials pursuant to a lump sum contract, the construction contractor pays either (1) sales tax at the time the construction materials are purchased; or (2) use tax at the time the construction materials are incorporated into real property if the contractor purchased or acquired the construction materials exempt from sales tax and the owner of the real property could not have purchased the materials exempt from sales tax (as evidenced by a customer's properly completed ST-105 General Sales Tax Exemption Certificate). Sales Tax Information Bulletin 60 (April 2011). (Emphasis added).

However, the authorities on which Taxpayer relies are those which address instances in which a contractor undertakes to "improve real property." In this instance, Taxpayer repaired a pump; Taxpayer has not established that it undertook to improve real property. As such, the issue is not whether Taxpayer's customer paid money pursuant to either a "lump sum contract" or a "time and material contract." Taxpayer simply billed its customer for both services and tangible personal property on one invoice.

Taxpayer has supplied copies of ST-103 sales tax returns. Taxpayer argues that the returns demonstrate that it paid sales tax on the \$110 in materials and that it should not have been assessed tax on the entire transaction. The returns do not contain an amount listed as "use" tax, but Taxpayer's records are sufficient to establish that the \$1,960 reported on the return incorporated \$110 in materials and that Taxpayer had self-assessed use tax on those materials.

However, resolution of the issue does not turn on whether or not Taxpayer self-assessed use tax on the materials used to repair the pump. The issue is whether Taxpayer should have collected sales tax from its customer. In this case, Taxpayer charged its customer one price for the cost of the labor and the cost of the materials. As such, the transaction is a "unitary transaction" as set out in IC § 6-2.5-1-1 as follows:

- (a) Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.
- (b) "Unitary transaction" as it applies to the furnishing of public utility commodities or services means the public utility commodities and services which are invoiced in a single bill or statement for payment by the consumer.

The regulation, [45 IAC 2.2-1-1](#)(a), explains that sales tax is imposed on the total value of the unitary transaction.

For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price. (Emphasis added).

The audit was correct when it assessed Taxpayer sales tax on the \$1,960 unitary transaction. Taxpayer is entitled to a "credit" on the amount of self-assessed use tax but – nonetheless – Taxpayer was required to collect tax on the price charged its customer.

FINDING

Taxpayer's protest is respectfully denied.

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